

USDA Forest Service
Attn: Appeal Reviewing Officer
1720 Peachtree Road, NW
Suite 811N
Atlanta, GA 30309-9102

November 06, 2009

Re: *Boating Parties* Stay Request of Implementation Floating Prohibitions on the Upper
Chattooga River dated October 29, 2009 (“Request”)

Dear Appeal Reviewing Officer:

On behalf of the hundreds of millions of rational American citizens whom disagree with the argument for unlimited access to Wilderness and unmanaged recreation on Wild and Scenic Rivers¹, please deny the Boating Parties Request. The Request should be denied because:

- I. Granting the boating parties Request would violate federal law under NEPA.**
- II. Granting the Request Ignores the 2006 federal court Decision.**
- III. Granting the Request violates the statutory mandates for managing this resource.**
- IV. Denying the Request does not harm boating Parties.**
- V. Denying the Request would not preclude the agency from making an informed decision.**

Each of these reasons is explained in detail below:

I. Granting the boating parties request would violate federal law under NEPA.

In the 2006 Motion to Dismiss [AW v. USFS], the USFS argued that opening the headwaters prior to completion of the analysis would likely violate federal laws and be irresponsible. Some excerpts of the motion to dismiss are provided below, the entire document is attached.

“Plaintiffs’[boating parties] argument to the contrary assumes that WSRA mandates that the Chattooga be opened to floating in all places, at all times, and by all users. But nothing in WSRA requires that result; to the contrary, WSRA confers broad discretion on the Forest Service to regulate and limit recreational uses to accommodate competing river values.”² ... “ Indeed, it would be irresponsible, and possibly violate a host of environmental laws, to throw open the river without first ascertaining whether and how the prohibition should be lifted and what the effects of doing so would be. The 2005

¹ 80% of Americans value non-use values over recreational values. Values Study Cordell et al., 2002, NPS

² Pg 1 Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006

Order merely leaves in place the prohibition required by numerous prior forest plans and a properly-promulgated regulation.”³ [AW v. USFS 2006] (emphasis added).

Ordering the agency to immediately open all of the Chattooga to floating would potentially cause it to violate numerous environmental laws. Without the proper environmental and social data that the visitor use capacity analysis and environmental impact statement or environmental assessment would fully analyze, the agency would potentially violate NEPA.⁴

The USFS acknowledge that the headwaters should not be open without completion of agency process and a valid user study of the effects of a revised policy under NEPA.

The boating parties administrative appeal filed on October 19th 2009, and the 2,000 page filing in SC federal court filed on October 14th , argue extensively that “social data” remains deficient and that a “visitor capacity analysis” has not been adequately completed. The boating parties own arguments highlight the fact that the USFS cannot, and should not, revise policy without a pragmatic, systematic and thorough review of their purported Capacity Analysis deficiencies included in the 2,000+ pages filed with the boater parties lawsuit. Before the USFS alters the thirty-three year old valid and properly promulgated policy, the merits of these purported deficiencies -highlighted within the Boating Parties timely filed appeal- should at least be given a proper and methodical review in order that NEPA laws are not in violation before allowing boating. All appellants should be given equal consideration.

II. Granting the Request ignores the 2006 Federal Court Decision.

The dismissal order details why the 1985 management decision, that limits boating to below highway 28, should remain in effect until after a the successful promulgation of a revised plan.

When discussing the 2005 USFS Appeal Decision Order, that initiated the recent Capacity Study, the court’s Order noted “*Management of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect.*’ (emphasis added). *The prohibition, as it has been for over twenty years, is a product of and traceable to the properly promulgated 1985 plan.*”⁵

The 2006 Dismissal Order adds that “*Had the Reviewing Officer, in her order reversing the challenged portion of the 2004 plan, fashioned the interim relief suggested by plaintiffs, other aggrieved parties could rightfully claim that her failure to revert to the immediately preceding plan violated the laws governing the establishment and implementation of forest plans. Similarly,*

³ P2 Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006

⁴ Pg 23 Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006

⁵ Pg 7 Dismissal Order, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

*if this court were to pronounce the Headwaters open, it not only would undermine these same laws but also would frustrate ongoing agency efforts to resolve this dispute”.*⁶

The court added that the extension of the 1985 policy that restricted kayak access to the headwaters “*is a temporary solution brought about by plaintiffs’ own challenge of the 2004 plan. Though parties should be encouraged to aggressively pursue the appeal of deficient plans, they should not be heard to complain where, because of their success, the agency temporarily reverts to an existing management plan while it works to correct the inadequacies of its new plan.*”

*“Even if the court were to set aside the 2005 order as [boating parties] request, the 1985 plan, which also includes a floating ban, would continue to provide management direction for the Headwaters.”*⁷

The 2006 Dismissal Order indicates that the 1985 boating limits are legal and remain the only legal policy for managing the Chattooga headwaters, until after a revised agency policy is successfully promulgated. The boating parties initiation of the 2006 lawsuit, binds them to court ruling, and now their extremely lengthy appeal delays the implementation of any boating of the headwaters until after a successful promulgation of the revised management plan.

III. Granting The Request Violates The Statutory Mandates For Managing This Resource.

The prioritization of governing statutes for Wilderness and the Wild and Scenic Rivers have again been overlooked by the boating parties’ request. The congressional intent for managing Wild and Scenic rivers dictates that the more restrictive management provisions set policy. By isolating individual statutes and management direction from the two governing Acts, the boating parties inaccurately characterize any limits on paddling as “illegal” by misrepresenting the laws.

The Chattooga Wild and Scenic River passes through five miles of the Ellicott Wilderness area. The governing statutes for areas with these dual designations require the agency to select the *more restrictive provisions*, when establishing management policy.

[“in case of conflict between the provisions of the Wilderness Act and this chapter, the more restrictive provisions shall apply” 16:28 § 1281(b).]

The boating parties cite a few isolated Wilderness and WSR guidelines that, when considered out of context, could be misconstrued to mean boating should be unrestricted.

⁶ Pg 9 Motion to Dismiss, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

⁷ Pg 18 Motion to Dismiss, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

However, by not considering the *more restrictive provisions*, the kayakers have evaded the intention of the governing statutes and continue to make erroneous claims about the legality of the zoning restrictions used to optimize the balance of recreation activities for the Chattooga.

The Wilderness mandates that require *opportunities for solitude* and the *protection* of the *wilderness character* would supersede any *protect and enhance* Wild and Scenic River mandates associated with recreation. Conversely, WSR *protect and enhance* requirements for solitude, scenery and esthetics, would supersede Wilderness requirement associated with providing *unconfined recreation*. On the Wilderness portion of any Wild and Scenic River, there exists a clearly expressed Congressional intention to utilize the more restrictive provisions and to protect esthetic, scenic and scientific values over recreational whims.

The boater parties have cherry picked the least restrictive provisions and presented these provisions as agency mandates; this is a completely misleading argument. Opportunities for kayaking is the last value that requires consideration in forest planning, not a primary mandate associated with managing the Chattooga Wild and Scenic River as it flows through the Ellicott Wilderness area.

The Wild and Scenic River governing statutes also contain a clear intent to prioritize certain values over recreational whims.

[“**primary emphasis** shall be given to protecting its’ esthetic, scenic, historic, archeological, and scientific features”^{16:28 § 1281(a)}]

Recreation is just one of the many Outstanding and Remarkable Values (ORVs) for which the Chattooga was designated a Wild and Scenic River. Not only must the agency balance recreational use among activities (hiking, swimming, angling etc.), the agency must also consider the water-quality, scenic, biology and esthetic values over any of these recreational values.

Maximizing paddling is not an agency directive as the boating parties claim, neither is myopically *protecting and enhancing* the recreation value in isolation of all other values. The agency must first consider *protecting and enhancing* the *esthetic* and *scenic* values before even considering “enhancing” recreational values on a Wild and Scenic River. Protecting the *scientific* values associated with rare flora, would also supersede any kayaker for access to the ecologically sensitive Chattooga Cliffs.

The governing statutes for managing Wild and Scenic Rivers (and associated Wilderness) prioritize protecting non-use values over opportunities for *unconfined recreation*. The expressed intent of the governing statutes best match the GA Forest Watch position , that o new boating opportunities be permitted on the upper Chattooga, especially through designated Wilderness.

IV Boating Parties Are Not Harmed By a Closure of the Headwaters.

The 2006 Dismissal Order has already ruled that the boater parties are not harmed because paddling is limited to the designated Chattooga below Highway 28.

*“ circumstances present in this case offset the conclusion that delayed review would result in hardship... while the Headwaters is currently closed to floating, abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters. ”*⁸ [AW v USFS 2006]

The boating parties are bound by this decision, that is a direct result of the lawsuit they had initiated in their previous attempt to usurp an ongoing agency process.

Predictably, the boating parties present the entire issue as if only paddlers should be considered when setting management policy. The request continues to ignore the impact boating will have to the current experience enjoyed by dispersed visitors above Highway 28.

Fortunately, the Boating Parties administrative appeal supplied expert testimony from Glenn Hass that highlights the need to consider all visitors. Mr. Hass argues eloquently that a capacity study should consider the capacity to all visitors and include the available recreational on the lower 36 miles of the designated Chattooga.

V: Denying the Request Would Not Preclude the Agency From Making an Informed Decision.

The boating parties request for stay implies that only by allowing unlimited boating on the headwaters could the agency possibly assess the effects of boating. This argument is absurd for two reasons, *a)* the historic review of management policy on the Chattooga concluded that unlimited boating did in fact harm the experience of other visitors and *b)* the impact unlimited boating has elsewhere indicate that boating impact has resulted in conflict elsewhere.

- a) Historical Review: Without being redundant and including the entire 2007 historical review that documented the effects of unlimited boating and justification for the zoning policy, I have included only the references supplied by the USFS in their 2006 Motion to Dismiss filing (attached), numerous more are included in the Capacity Analysis 2007 Historical Review and the public record.

⁸ Pg 17-18 *Dismissal Order*, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

Documented Effects Boating has had on Other Chattooga Parties. From Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006		
Page #	Referenced Document	Quote
11,849	Development Plan Federal Registry. Mar. 22, 1976	"[t]he recent increase in floaters using the river has had a detrimental effect on the fishing experience. Conflicts have developed on certain sections of the river where floaters and fishermen use the same waters."
11,850.	Development Plan Federal Registry. Mar. 22, 1976	"[a]lthough current levels of all types of uses create some problems, uncontrolled future use would probably result in safety hazards and a lowering of the quality of the recreation experience and when need warrants, this will be prevented by the establishment of regulations limiting size, number, type, etc., to provide optimum use." Id. at
11852	Development Plan Federal Registry. Mar. 22, 1976	"[t]his area remains a favorite spot for trout fishing. This location is the source of some of the best trout fishing in both South Carolina and Georgia. Floating will be prohibited above Highway 28" Although floating above Highway 28 was to be prohibited, to make certain that floating was accommodated on the river, no limitations or restrictions were placed on floating downstream of Highway 28, consisting of over 36 miles of the 57 mile river corridor. The Forest Service determined that this large portion was the most generally desirable, physically suitable, and highly used area for floating on the river. By exercising its discretion to manage the river this way, the Forest Service was able to reasonably accommodate two specific conflicting recreational uses, benefitting the individuals who wished to float the river and those who wished to experience quality trout fishing in the only areas of the river that offered that experience."
2	Comprehensive River Mgt. Plan August,26 1977	"[a]lmost all floating occurs below [the] Highway 28 bridge. Fishermen tend to congregate at [the] Highway 28 Bridge, Burrells Ford and Bull Pen Bridge, the major stocking points [upstream of Highway 28]."
26	Comprehensive River Mgt. Plan August,26 1977	"[f]loating above Highway 28 Bridge will be prohibited and fishing encouraged in this section."
Appdx M-16	Sumter Forest Service, LRMP August, 1985	"[t]he Chattooga is considered to be the best trout stream in South Carolina and one of the best in Georgia," "[t]his is especially true on the undeveloped section north of the Highway 28 Bridge where floating use is not permitted to provide quality trout fishing." Id. at M-16.
Appdx H	Sumter Forest Service, LRMP August, 2004	Based upon the FEIS,either alternative that allowed for boating above the Highway 28 Bridge would likely result in unacceptable impacts on social and physical resources. He concluded that by continuing to exclude floating above Highway 28, the ORVs for the river would be protected and enhanced

The historical record proves boats have had impact on other Chattooga visitors.

b) The 2006-2007 Visitor Capacity analysis included a literature review of conflicts found elsewhere; the report concluded.

- *"passing boats can 'disturb and displace spawning Chinook salmon if the interactions occur at close proximity' "*⁹, This applies to boats on headwaters streams, like the Chattooga North Fork.
- *"Many anglers prefer to fish areas that are not being used by other recreationists such as boaters"* (Harris & Bergersen, 1985)¹⁰ ...Therefore angler displacement.
- The angler panel members indicated that *"the high end of optimal fishing was, about 3.0, for spin/bait fishing."*¹¹ This is approximately 750cfs on the B.F. gauge.

⁹ Page 69, *Assessing Visitor Capacity & Conflict on the Upper Chattooga June 200 7, USFS*

¹⁰ Page 68 *Assessing Visitor Capacity & Conflict on the Upper Chattooga, June 2007, USFS*

- “ activities such as hiking, camping, walking, biking, wildlife observation, photography and similar riverside recreation can often occur along a river regardless of the flow, but flows may enrich the experience with aesthetic benefits”.¹² Indicating that flow levels are irrelevant to hiking visitors looking for a remote backcountry experience without floater interruptions.

Other Rivers Have Highlighted River Conflict Concerns.

- “Boating activities can also lead to conflicts with other users, such as people fishing, taking photographs, or swimming.” Chapter 1 Merced WSR CMP/FEIS 2001 NPS
- A 2007 Scotland Tourism report found “unavoidable conflict between canoeing and fishing” ... “anglers and canoers are in direct conflict since canoes scare fish to the bottom of the river and make fishing much more difficult.” Pg 52, *Rural Sports Tourism* , 2007 LOCUM, Scotland
- The USFS published “Heavy canoe use is conflicting more and more with many other river users. Many trout streams are no longer fished during the daytime hours because of canoeing disturbances. ... Conflicts are common among canoeists and fisherman, sightseers, bird watchers, swimmers and frontage owners.”¹³
- A recent study conducted by UK’s Environmental Agency “identified disturbance caused by canoeists to anglers as an area of conflict”¹⁴.
- In 2002, the Southern Forest research assessment published that “Water attracts a wide variety of visitors, including swimmers, viewers of fish, anglers, and users of muscle- and motor-powered watercraft. The possibilities of conflict are obvious. For the most part, all the uses just listed are incompatible with each other.”... “zoning can ensure that different types of users are physically separated”¹⁵
- In January of 2007 the British parliament voted against unlimited boater access to UK’s inland waterways based on the conflict between anglers and boaters.¹⁶ The report compiled over years of study found boating does conflict with anglers, riparian wildlife and landowner interests. In parliament Martin Salter MP argued that “**Unlimited access to smaller rivers and streams would destroy angling in these locations.**”

There are numerous references to conflicts amongst river visitors. The lack of references included within the 2007 *Capacity and Conflict Report* more likely highlights the unwillingness of the report authors to including these conflict references.

The Boating Parties argument, that it would be impossible to determine the effects from boats, without first allowing unlimited access to all boats of all kinds appears a bit shortsighted given that the American Canoe Association have argued against access for motorized water craft to other areas like the Boundary Waters. In addition, since impacts from boating were the justification for prohibiting boating above highway 28 in 1985, the need to reassess those impacts appears redundant and wasteful.

¹¹ page 20 *Upper Chattooga River: Expert Panel Field Assessment Report*; Sumter USFS 2007

¹² Page 29 *Chattooga River Capacity Analysis; Literature Review Report*; Lois Berger group 2007 USFS]

¹³ pg 113, Doehne, USDA Forest Service General Technical Report NC-28. 1977.

¹⁴ p 17 *Countryside Recreation* Volume 9 Number 1 Spring 2001 UK Environmental Agency

¹⁵ *Potential Conflicts Between Different Forms Of Recreation*, 2002, Southern Research Station USDA Forest Service.

¹⁶ “Effects of Canoeing on Fish Stocks and Angling” Technical Report W266 UK Environment Agency 2000

The boating parties appear to be argue that all activities must be granted unlimited access for some period of time, at the start of every planning cycle, in order to assess effects. Under this argument, all managing agency must first allow 4x4s on playgrounds, year-round hunting, PWC in swimming areas, and motor-cross races down the Appalachian Trail , during each planning cycle, before it can re-conclude that limitations – that are currently in place- are still necessary. This argument ...well...is surely something.

In conclusion, the Boater Parties Request repeats the same myopic arguments.

i) That agency policy protect private kayaking through active management, but that no river management be applied to kayaking. ii) That the USFS only consider the boating parties when establishing river policy. iii) That the USFS ignores that boater parties already enjoy unlimited access to the majority of the Chattooga. The Request should not be granted.

Sincerely

Michael Bamford

Michael Bamford
PO 2725
Cashiers, NC 28717

cc: Justin D. Austin Jr. jaustin@pattonboggs.com
Ken Arney Deputy Regional Forester karney@fs.fed.us